Supreme Court, U.S.
FILED
SEP 6 2002
CLERK

No. 02-187

In The

Supreme Court of the United States

JAKES, LTD., and RICHARD J. JACOBSON,

Petitioners,

vs.

CITY OF COATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF RESPONDENT CITY OF COATES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES J. THOMSON
Counsel of Record
KENNEDY & GRAVEN, CHARTERED
470 Pillsbury Center
200 South Sixth Street
Minneapolis, MN 55402
612/337-9300

Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Is the Eighth Circuit's decision upholding the amortization provision in the City's zoning ordinance consistent with this Court's ruling in *City of Renton v. Playtime Theaters, Inc.* and *City of Erie v. Pap's A.M.*?

2. Is the Eighth Circuit's decision upholding the validity of the City's licensing ordinance consistent with this Court's decision in *FW/PBS, Inc. v. City of Dallas* and *City of Los Angeles v. Alameda Books, Inc.*?

3. Does Petitioners' challenge to the Minnesota statute permitting amortization of sexually oriented businesses raise any constitutional issue?

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JURISDICTIONAL STATEMENT

The Court of Appeals for the Eighth Circuit affirmed the judgment of the District Court in this matter on March 26, 2002. The Eighth Circuit denied Petitioners' Petition for a Rehearing and a Rehearing en banc on May 3, 2002. The Petition for Writ of Certiorari was docketed on August 7, 2002.

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

The First Amendment to the United States Constitution: "Congress shall make no law . . . prohibiting the free exercise thereof; or abridging the freedom of speech. . . . "

City of Coates Ordinances 36, 40, and 41

STATEMENT OF THE CASE

1. Factual Recitation

Petitioner Richard J. Jacobson is the President and fifty percent owner of Petitioner Jake's Ltd., Inc., a Minnesota corporation that operates a business known as Jake's Bar. (A50) Jakes, which features live nude dancing, opened in the City of Coates in January 1992. (A50)

In June 1994, the City adopted Ordinance 21, which amended the City's Zoning Ordinance by adding Section 522 regulating sexually oriented businesses. (A50) Section 522 required sexually oriented businesses to be located in agricultural districts and required them to be located at least 750 feet from any other sexually oriented businesses

and 750 feet from certain protected uses, including single family dwellings, residentially-zoned property, and public parks. (A52) Jakes violated Section 522 because the business was not located in an agricultural zone and because it was within 750 feet of a single-family dwelling. Section 522 contained a "grandfather" provision that allowed Jakes, as a preexisting nonconforming sexually oriented business, to remain at its existing location until December 31, 1996. (A54)

Petitioners filed a previous lawsuit challenging the City's 1994 ordinance. (A56) In that lawsuit, the district court declared the City's ordinance unconstitutional because of a requirement that a portion of any new subdivision of land be donated as park land, which would not leave any site where Petitioners could lawfully relocate their business. (A3) The district court stated, however, that if the City changed its ordinance to eliminate the offending provision, the zoning ordinance would pass constitutional muster. (A3)

In response to the district court's ruling in the previous lawsuit, the City Council adopted Ordinance 31, which amended the City's subdivision regulations to eliminate the park dedication requirement for non-residential property. (A56) The City Council also adopted Ordinance 32, which amended Section 522 by changing the date by which sexually oriented businesses needed to come into compliance from December 31, 1996 until December 31, 1999. (A56)

On December 13, 1999 the City adopted Ordinance 36. (A56) That ordinance imposed licensing requirements and other regulations on sexually oriented businesses. With respect to live adult entertainment, the regulations, among

other things, required the dancers to be no closer than six feet from any patron and prohibited dancers from soliciting tips from customers. (A60)

2. Procedural Posture

Petitioners commenced this lawsuit on December 29, 1999 challenging the validity of Ordinances 31, 32, and 36. Petitioners alleged that Ordinances 31 and 32 were invalid under state law because they were adopted without complying with the published notice and hearing requirements contained in Minnesota Statutes, Section 462.357, Subd. 3 and because the amortization provision in Ordinance No. 32 violated Minnesota Statutes, Section 462.357, Subd. 1c. (A61) Petitioners also contended that the amortization provision in Ordinance No. 32 violated the First Amendment because: (1) it was enacted without an empirical basis for believing that Petitioners' business caused adverse secondary effects; (2) it would have the effect of suppressing or greatly reducing access to constitutionally protected speech; and (3) it did not have the effect of reducing adverse secondary effects. (A63)

Petitioners contended that Ordinance No. 36 was facially unconstitutional and unconstitutional as applied to their business because, among other things: (1) it constituted an unlawful prior restraint; (2) it vested impermissible discretion to the City; (3) it failed to provide procedural due process; (4) the disqualification based upon prior criminal convictions was an unlawful prior restraint; and (5) the provision requiring a six-foot separation distance between the dancers and the patrons was a form of content-based censorship. (A64)

Because of Petitioners' allegations with respect to the procedural defect in the City's adoption of Ordinance 31, the City Council adopted Ordinance 40, which repealed Ordinance 31 and re-adopted Section 522 of the City Code in its entirety (A219), and Ordinance 41, which adopted the same amendment to the subdivision regulations that had been adopted by Ordinance 32. (A20)

Both Petitioners and the City moved for summary judgment. (A15) The district court (the Honorable Donovan W. Frank) upheld the constitutionality of Ordinances 36, 40 and 41. (A37) The district court trial court denied Petitioners' motion for amended findings and granted the City's request for a revised order enjoining Petitioners from operating a sexually oriented business at its current location. (A39) The court granted Petitioners' motion for a stay of the trial court's order pending appeal. (A39)

The Eighth Circuit affirmed the district court decision with one slight modification. (A1)

REASONS FOR DENYING THE WRIT

1. The Eighth Circuit's Decision Upholding the Amortization Provision in the City's Zoning Ordinance as a Valid Time, Place and Manner Restriction is Consistent with This Court's Ruling in *City of Renton v. Playtime Theatres, Inc.* and *City of Erie v. Pap's A.M.*

The threshold inquiry in a First Amendment case involving a challenge to a zoning ordinance is whether the legislation is a content-based restriction or a content-neutral time, place, and manner restriction. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Young v.*

American Mini Theatres, Inc., 427 U.S. 50 (1976). Regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment, while content-neutral time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication. In *Renton*, this Court defined "content-neutral" regulations as ones that "are *justified* without reference to the content of the regulated speech." *Renton*, 475 U.S. at 48 (emphasis in original). Because the stated purpose of the ordinance at issue in *Renton* was to address the secondary effects of adult businesses, this Court concluded that the zoning ordinance was not content-based but rather content-neutral. *Id.*

The second prong of the *Renton* test is to determine whether the ordinance serves a substantial governmental interest. To satisfy this prong, a municipality must show that the ordinance is aimed at the negative secondary effects of adult uses rather than the content of the speech. A city may rely on the secondary effects studies of other cities as evidence of secondary effects when drafting its ordinances. This Court held in *Renton* that a municipality is *not* required to "conduct new studies or produce evidence independent of that generated by other cities or towns, so long as whatever evidence the municipality relied upon is *reasonably believed* to be relevant to the problem sought to be addressed." *Id.* at 51-52 (emphasis added).

The "reasonably believed" factor in the second prong of the *Renton* test does not require a city to prove negative secondary effects. In *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), this Court recently affirmed the evidentiary

standard in *Renton* and once again held that cities do not need to prove adverse secondary effects, but rather may rely on the experience of other cities.[1] In *Erie*, this Court upheld an ordinance banning nudity in public places where the city relied on the secondary effects studies of other cities. Citing the "reasonably believed" test from *Renton*, this Court held that

> [b]ecause the nude dancing at Kandyland is of the *same character* as the adult entertainment at issue in *Renton*, *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) . . . and *California v. LaRue*, 409 U.S. 109, 93 S.Ct. 390 (1972), it was reasonable for Erie to conclude that such nude dancing was likely to produce the same secondary effects. And Erie could reasonably rely on the evidentiary foundation set forth in *Renton* . . . to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood.

Erie, 529 U.S. at 296-97 (emphasis added) (citing *Renton*, 475 U.S. at 51-52). *Erie* confirms that studies upon which cities rely do not have to be directly on point in order to pass the narrow tailoring test. If the adult use is of the same character and a city "reasonably believes" that the activity may cause some of the negative secondary effects set forth in the studies, an ordinance will pass constitutional muster. *See also Young*, 427 U.S. at 71 (An ordinance need not adopt the least restrictive alternative and

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[1] Although the Court analyzed the ordinance in *Erie* under the four-part test in *United States v. O'Brien*, 391 U.S. 367 (1968), the Court noted that "the evidentiary standard described in *Renton* controls here." *Erie*, 529 U.S. at 297.

"must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.").

The third prong of the *Renton* test is to determine whether the ordinance provides a reasonable alternative avenue of communication. This prong is satisfied by providing adult uses with a reasonable opportunity to locate within the city. *Renton*, 475 U.S. at 53.

Petitioners make absolutely no showing as to how the amortization provision in the City's ordinance conflicts with the *Renton* or *Erie* decisions. An amortization provision is not a provision regulating adult uses. Rather, it is merely a land use tool that requires adult businesses to come into compliance with the City's substantive regulations by a specified time. Petitioners do not challenge any of the substantive regulations in the City's zoning ordinance. An amortization provision is not governed by the *Renton* standards, and Petitioners cite no decisions of this Court or any Circuit Court to the contrary.

2. The Eighth Circuit's Decision Upholding the Validity of the City's Licensing Ordinance is Consistent with This Court's Decision in *FW/PBS, Inc. v. City of Dallas* and *City of Los Angeles v. Alameda Books, Inc.*

A licensing regulation pertaining to sexually oriented businesses is not an unconstitutional prior restraint on speech if the regulations contain safeguards that minimize the possibility that the licensing procedure will be used to suppress speech. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990). In *FW/PBS*, the Court established three

requirements for licensing ordinances governing sexually oriented businesses:

> 1. The licensing scheme cannot grant unbridled discretion to a governmental official or agency;
>
> 2. The licensing scheme must set forth specific and reasonable time limits during which the decision-maker must make the decision on whether to grant or deny the license; and
>
> 3. The licensing scheme must provide an opportunity for prompt judicial review of a decision not to grant a license. *Id.* at 225-27.

Petitioners make no attempt to show how the Eighth Circuit's decision on the licensing ordinance violates the *FW/PBS* standard. To the contrary, Petitioners admit that the Eighth Circuit reached a result similar to that reached by this Court in *FW/PBS*. (Petition, at 25)

With respect to whether the licensing ordinance grants unfettered discretion to the City, Petitioners rely solely on a provision in the ordinance dealing with suspension of licenses. (Petition, at 22-23) That provision is not applicable to the facts of this case, which involves the issuance of a new license, not the suspension of an existing license. Such an issue hardly rises to the threshold of an "important matter" contemplated in Rule 10.

With respect to the provision establishing a license fee, the Eighth Circuit decision is consistent with this Court's decision in *Murdock v. Pennsylvania*, 319 U.S. 105, 115-16 (1943). In *Murdock*, this Court held that a licensing fee for a First Amendment protected activity must be revenue neutral and may not be a charge for the privilege of exercising a constitutional right. The Eighth Circuit

correctly held that Petitioners' submitted no evidence to the trial court to support their contention that the City's fee was anything other than revenue neutral.

Petitioners' challenge to the provision requiring a six-foot separation between dancers and patrons and a prohibition on tips is consistent with every other Circuit Court decision on this issue. (*See* cases cited by Eighth Circuit; A12) Petitioners' contention that this Court's decision in *City of Los Angeles v. Alameda Books*, 535 U.S. ___, 122 S.Ct. 1728 (2002) requires a trial on the six-foot separation requirement and the prohibition of payment of gratuities is misplaced for at least two reasons. First, unlike the facts in *Alameda Books*, this case was decided on cross-motions for summary judgment. Neither the City nor Petitioners contended that there were any triable issues of fact. In light of that procedural background, any issues that Petitioners now raise with respect to the trial court's decision on the summary judgment motion certainly do not rise to the level required by Rule 10. In addition, as stated above, the Eighth Circuit decision on this issue is consistent with every other Circuit Court decision on the issue.

3. Petitioners' Challenge to the Validity of the Minnesota State Statute Permitting Amortization of Adults Only Businesses Raises No Constitutional Issue.

The Eighth Circuit concluded that Petitioners' arguments with respect to the Minnesota state statute authorizing use of amortization for adult businesses was "a jumble of federal and state law concepts." (A9) Their petition continues to muddle these concepts. The state statute is merely an enabling act allowing municipalities to use amortization for adult businesses. Nothing in this

Court's decision in *Alameda Books* or any Circuit Court decision requires that an enabling statute be adopted only after empirical evidence is presented of secondary effects. Amortization provisions have uniformly been upheld in adult use cases without any showing of empirical evidence of adverse secondary effects. *Ambassador Books & Video, Inc.*, 20 F.3d 858 (8th Cir. 1994); *Holmberg v. City of Ramsey*, 12 F.3d 140 (8th Cir. 1994) Petitioners cite no decision of this Court or any Circuit Court to the contrary.

The Eighth Circuit held that the state statute allowing amortization of adult businesses was valid under a deferential, rational-basis review standard. (A9) Petitioners contend that this conclusion is at odds with this Court's decision in *Alameda Books* and the Eleventh Circuit's decisions in *Ranch House, Inc. v. Amerson*, 238 F.3d 1273 (11th Cir. 2001) and *Flanigan's Enterprises v. Fulton County*, 242 F.3d 976 (11th Cir. 2001). What Petitioners ignore, however, is that none of those decisions involved a state zoning-enabling statute. Rather, they all involved substantive regulations dealing with adult businesses and therefore are not controlling on this issue.

CONCLUSION

For the reasons set forth above, the City respectfully requests that the petition for writ of certiorari be denied.

Dated September 6, 2002.

Respectfully Submitted,

JAMES J. THOMSON
Counsel of Record
KENNEDY & GRAVEN,
CHARTERED
470 Pillsbury Center
200 South Sixth Street
Minneapolis MN 55402
612-337-9300